

***NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 02-111-04
JULY 8, 1996***

***Protected Resources Management
Section 6 Agreements***

***COOPERATIVE AGREEMENT AMONG NMFS, MA. DEPT OF FISHERIES,
WILDLIFE & ENVIRONMENTAL LAW ENFORCEMENT, AND MA. DIV'N OF
FISHERIES AND WILDLIFE FOR THE CONSERVATION OF
THREATENED AND ENDANGERED SPECIES***

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[Approving Authority name] Date
[Approving Authority title]

7/8/96

ENDANGERED SPECIES ACT
SECTION 6 COOPERATIVE AGREEMENT AMONG
THE NATIONAL MARINE FISHERIES SERVICE
OF THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
OF THE U.S. DEPARTMENT OF COMMERCE,
THE MASSACHUSETTS DEPARTMENT OF FISHERIES,
WILDLIFE & ENVIRONMENTAL LAW ENFORCEMENT,
AND THE MASSACHUSETTS DIVISION OF FISHERIES AND WILDLIFE
FOR THE CONSERVATION OF ENDANGERED AND THREATENED SPECIES

This Cooperative Agreement is entered into pursuant to Section 6(c)(1) of the Endangered Species Act of 1973, 16 U.S.C. §1531 et seq., ("the Act"), between the National Marine Fisheries Service ("NMFS"), an agency of the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce, and the Massachusetts Department of Fisheries, Wildlife & Environmental Law Enforcement and the Massachusetts Division of Fisheries and Wildlife (collectively, "MASS").

I

WHEREAS, the Congress of the United States has found that there are resident species of fish or wildlife which are in danger of extinction and that these species of fish or wildlife are of aesthetic, ecological, educational, scientific, economic, and other value to the Nation and its people;

II

WHEREAS, the purposes of the Act are to provide a means whereby the ecosystems upon which endangered or threatened fish or wildlife depend may be conserved, to provide a program for the conservation of such species, and to take such steps as may-be appropriate to achieve the purposes of the various treaties and conventions related to the conservation of fish or wildlife;

III

WHEREAS, the Congress of the United States has declared that encouraging the states and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in its fish or wildlife;

IV

WHEREAS, the Secretary of Commerce has delegated responsibilities under the Act to the NMFS;

V

WHEREAS, NMFS desires to enter into this Agreement for the purpose of assisting in the implementation of the endangered and threatened fish or wildlife conservation programs of Commonwealth of Massachusetts for those species under NMFS jurisdiction pursuant to Reorganization Plan Number 4 of 1970 and any subsequent agreement with the U.S. Fish and Wildlife Service;

VI

WHEREAS, the Commonwealth of Massachusetts, acting through MASS, wishes to administer its programs for the conservation of endangered or threatened fish or wildlife listed in Appendix I of this Agreement in harmony with the terms and spirit of the Act;

VII

WHEREAS, the parties agree that programs of MASS are designed to assist resident endangered fish and wildlife listed in Appendix I and that it is the mutual desire of MASS and NMFS to work in harmony for the common purposes of planning, developing and conducting programs to protect, manage and enhance populations of all resident endangered or threatened fish or wildlife within this state listed in Appendix I;

VIII

WHEREAS, NMFS has the statutory and administrative responsibility to establish programs for the conservation of endangered and threatened species which are under its jurisdiction pursuant to Reorganization Plan Number 4 of 1970 and any subsequent agreement with the U.S. Fish and Wildlife Service; to reach agreement with MASS as to which resident endangered or threatened species are most urgently in need of a conservation program in Commonwealth of Massachusetts; to provide review of the MASS program at annual intervals; to provide funding to that program as such funding is available and in accordance with the terms of the Act; to provide coordination among the programs of the various States; and to exchange with MASS such biological data or other information which may result in the enhancement of the opportunities for the continued survival of endangered or threatened fish or wildlife;

IX

WHEREAS, MASS has statutory and administrative responsibility to conserve endangered or threatened fish or wildlife which are resident in the Commonwealth of Massachusetts, including waters of the Commonwealth of Massachusetts, and listed in Appendix I of this Agreement;

X

WHEREAS, the Division of Marine Fisheries and the Division of Fisheries and Wildlife, both divisions within the Massachusetts Department of Fisheries, Wildlife and Environmental Law

Enforcement, have entered into a Memorandum of Agreement Regarding Jurisdictional Responsibilities, Listing Procedures and Designation of Significant Habitat for Endangered, Threatened and Special Concern Species in order to facilitate and enhance management and protection of marine resources within the Commonwealth of Massachusetts; and

XI

WHEREAS, MASS (a) has authority to conserve resident fish or wildlife determined by the MASS or the Secretary to be endangered or threatened and listed in Appendix I of this Agreement; (b) is establishing an acceptable conservation program, consistent with the purposes and policies of the Act, for all resident fish or wildlife in the Commonwealth of Massachusetts which are deemed by the Secretary to be endangered or threatened and listed in Appendix I, and has furnished a copy of such program together with all pertinent details, information and data requested by the Secretary; (c) is authorized to conduct investigations to determine the status and requirements for survival of resident fish and wildlife listed in Appendix I; (d) has authority to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened fish or wildlife listed in Appendix I; and (e) provides for public participation in the designation of resident fish or wildlife as endangered or threatened;

Now, therefore, the parties agree as follows:

1. Cooperative Program

(a) MASS shall carry out the activities identified in its conservation programs and included in Appendix II of this Agreement for the benefit of the endangered or threatened fish or wildlife which are resident in the Commonwealth of Massachusetts, including marine waters, under the jurisdiction of the Commonwealth, and listed in Appendix I of this Agreement.

(b) In order to ensure that MASS has established an acceptable conservation program, consistent with the purposes and policies of the Act, for those species listed in Appendix I, on June 30 each year, in conjunction with the reporting requirements required by section 6(b) of this Agreement, MASS shall furnish to NMFS all pertinent details, information and data requested by NMFS, that identifies the conservation programs for those species that NMFS and MASS agree are most urgently in need of such conservation programs. This shall include information as specified in Appendix II of this Agreement.

(c) NMFS may agree with MASS to provide financial assistance for the implementation of an acceptable project for the conservation of endangered and threatened fish or wildlife. Such financial assistance will require the submission of an

Application for Federal Assistance and Grant-In-Aid Award and successful negotiation of a Project Agreement.

(d) As additional species of resident fish or wildlife in the Commonwealth of Massachusetts are determined by NMFS to be endangered or threatened pursuant to Section 4(a) of the Act, the parties agree to revise Appendix I promptly upon such final determination, and upon a determination by NMFS based on a submission of information by MASS, that MASS maintains an adequate and active conservation program with respect to such species, and to cooperate in the development of programs and projects for the benefit of such species.

(e) It is understood that any Federal funding pursuant to Section 6(d) of the Act is contingent on the continued implementation of an adequate and active program for the conservation of Federally listed endangered and threatened fish or wildlife which are resident in the Commonwealth of Massachusetts and which are listed in Appendix I. If the program for conservation of such fish or wildlife is determined by NMFS to be inadequate or inactive, this Agreement and funding pursuant thereto shall be terminated in accordance with section 8 of this Agreement.

(f) As part of the listing, designation, and recovery plan processes of Section 4 of the Act, the consultation process of Section 7 of the Act, and the permit process of Section 10 of the Act, and in accordance with the policy issued by NMFS and the U.S. Fish and Wildlife Service on July 1, 1994 with respect to cooperation with State governments, the parties agree to exchange biological and other data as necessary to facilitate implementation of the ESA with respect to resident fish and wildlife in the Commonwealth of Massachusetts.

(g) All activities affecting endangered and threatened marine mammals shall be consistent with the Marine Mammal Protection Act of 1972, 16 U.S.C. §1361 et seq., as well as with the Act.

(h) As part of this cooperative program, the law enforcement authorities of NMFS and MASS shall cooperate in the detection, apprehension, and prosecution of violators of the Act or State laws which are intended to conserve endangered and threatened fish or wildlife. This Agreement does not grant Federal enforcement authority to State enforcement officers or State enforcement authority to NMFS officers.

(i) Entering into this Agreement shall not affect the applicability of prohibitions set forth in or authorized pursuant to Section 4(d) or Section 9(a) (1) of the Act.

2. Permits, Exceptions.

(a) General Rule. Except as authorized in subsection 2(b), (c), or (f) of this Agreement, MASS agrees not to engage in, or issue a permit authorizing the taking of, any resident Federally endangered fish or wildlife listed at 50 C.F.R. 222.23(a), or any resident Federally threatened fish or wildlife listed at 50 C.F.R. 227.4 the taking of which is prohibited, which is listed in Appendix I of this Agreement, without the prior issuance of a permit to the applicant by NMFS.

(b) Marine Mammals. Any employee, designee or agent of MASS is authorized to take in a humane manner endangered or threatened marine mammals in the course of his or her duties without a Federal permit only if such taking is for (a) the protection or welfare, of the marine mammal, (b) the protection of the public health and welfare, or (c) the non-lethal removal of nuisance animals.

(c) Endangered Species. For any program or project listed in Appendix II of this Agreement, any employee or agent of MASS who is designated by MASS for such purposes, when acting in the course of his or her official duties within the waters under the jurisdiction of MASS and under general permit authority of MASS, may take any resident Federally endangered fish or wildlife, or threatened fish or wildlife the taking of which is prohibited by regulation other than marine mammals which are subject to subsection 2(b), for conservation purposes defined in Section 3(3) of the Act, that are consistent with the purpose of the Act and that are consistent with this Agreement, or any Project Agreement, entered into pursuant to this Agreement, provided that such taking is not reasonably anticipated to result in:

- (1) the death or permanent disabling of the specimen;
- (2) the removal of the specimen from the Commonwealth of Massachusetts;
- (3) the introduction of the specimen or any of its progeny into an area beyond the historical range of the species; or
- (4) the holding of the specimen in captivity for a period of more than 45 consecutive days.

(d) Threatened Species. For any program or project listed in Appendix II of this Agreement, any employee or agent of MASS who is designated by MASS for such purposes, when acting in the course of his or her official duties under general permit authority of MASS, may take any resident Federally listed threatened fish or wildlife, other than marine mammals, unless such taking is prohibited by NMFS regulation, in which case the limitations for takings in subsection 2(c) of this Agreement shall apply.

(e) Suspension. The authority conveyed under subsections 2(c) and (d) may, at any time, be temporarily suspended for a particular project or part of a conservation program identified in Appendix II, by written notification from the Assistant Administrator for Fisheries of NOAA, or his or her authorized delegate, upon receipt of substantial evidence demonstrating that the use of this authority is inconsistent with the purposes of the Act. Upon notification of the temporary suspension and the reasons therefor, MASS may request from the Assistant Administrator for Fisheries of NOAA an opportunity to demonstrate compliance with the purposes of the Act. The Assistant Administrator for Fisheries shall promptly consider the evidence so submitted by MASS and either reaffirm the initial conclusion, revoking MASS' authority for that particular project or program pursuant to this Agreement, or reject the initial conclusion and reinstate MASS' authority for that particular project or program of this Agreement.

(f) Emergency Provisions. Any employee or agent of MASS who is designated by MASS for such purposes, when acting in the course of official duties and under the general permit authority of MASS, may take Federally endangered fish and wildlife, and threatened fish or wildlife the taking of which is prohibited by regulation, if such action is necessary to:

- (1) aid a sick, injured, or orphaned specimen; or
- (2) dispose of a dead specimen; or
- (3) salvage a dead specimen which may be useful for scientific study; or
- (4) remove specimens which constitute a demonstrable, but non-immediate, threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injury only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in a remote area; or
- (5) defend his or her own life or the lives of others.

(g) Reporting. Any taking pursuant to subsection 2(f) must be reported in writing within 5 days to the NMFS Regional Director, for transmission to the NMFS Office of Enforcement. The specimen may only be retained, disposed of, or salvaged in accordance with directions from NMFS.

3. Records.

In addition to any further record keeping requirements for

specific programs or projects that may be set forth in Appendix II of this Agreement, MASS shall maintain records of: (1) its Federally funded projects for the conservation of endangered and threatened fish or wildlife listed in Appendix I in accordance with the Federal Aid Manual; and (2) the number of specimens of each species of Federally listed endangered and threatened fish or wildlife listed on Appendix I taken by MASS officials or agents pursuant to subsections 2 (c) and (d) of this Agreement, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking.

4. Notification.

(a) MASS agrees to inform NMFS of any change in circumstances that could cause the program to be out of conformance with the requirements of Section 6 (c) of the Act, including changes in MASS' relevant constitutional, statutory, or regulatory authority. MASS shall promptly furnish NMFS with an assessment of the effect of such a change on MASS' ability to remain in compliance with the requirements of Section 6 (c) of the Act.

(b) MASS agrees to promptly inform NMFS of any change in the programs or projects identified in Appendix II, or any change in circumstances that affect such programs or projects.

(c) NMFS agrees to notify MASS of all regulations, issued in accordance with Section 4 of the Act, which might affect the adequacy and effectiveness of the conservation program for MASS.

5. Interagency Cooperation.

Incorporated herein and attached hereto as Appendix III is the Memorandum of Agreement Between the Division of Marine Fisheries and the Division of Fisheries and Wildlife Within the Massachusetts Department of Fisheries, Wildlife and Environmental Law Enforcement Regarding Jurisdictional Responsibilities, Listing Procedures and Designation of Significant Habitat for Endangered, Threatened and Special Concern Species. This Agreement governs the jurisdiction of, and authority exercised by, agencies within the Department and is an important part of this cooperative program of endangered and threatened species management.

6. Effective Date and Renewal.

(a) This Agreement shall become effective when signed by the Assistant Administrator for Fisheries of NOAA, the Commissioner of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement and the Director of the Division of Fisheries and Wildlife within that Department.

(b) This Agreement may be renewed in the following manner:

(1) No later than June 30 of each year MASS shall submit to NMFS the following: (i) an updated list of Federal and State listed endangered and threatened fish and wildlife which are resident in the Commonwealth of Massachusetts and a statement of any modifications MASS wishes to propose to the list of fish or wildlife species; (ii) a memorandum of law analyzing any changes in MASS statutory authority for the protection and conservation of endangered and threatened fish or wildlife, if any changes in statute or regulation were made since the date of the previous program submission; (iii) a description of any substantial changes in MASS programs for the resident endangered and threatened fish or wildlife which are being proposed or which have occurred since the date of the previous program submission (iv) a detailed description of the number of specimens of each species of Federally listed endangered and threatened fish or wildlife listed in Appendix I taken by MASS employees or agents pursuant to subsections 2 (c) and (d) of this Agreement, the conservation purposes for which they were taken, and any mortalities or permanently disabling injuries resulting from the taking; and (v) copies of such reports MASS may have prepared since the previous program submission which discuss its conservation program accomplishments for listed endangered and threatened fish or wildlife. For purposes of this Agreement, the phrase "previous program submission" means either the program submission of the original Agreement or the most recent renewal application of this Agreement, whichever is later in time.

(2) The Assistant Administrator for Fisheries of NOAA or his or her authorized delegate will notify MASS in writing on or before October 1 of each year that: (i) this Agreement is renewed effective October 1 of that year upon a reconfirmation of the finding that MASS maintains an adequate and active program for the conservation of resident threatened and endangered species listed in Appendix I of this Agreement; or (ii) MASS programs or authorities are not in compliance with the criteria of Section 6 (c) of the Act. Such notification in the latter situation shall also state that unless appropriate changes are made by June 30 of the following year, this Agreement shall be terminated. If MASS has not received notification concerning the renewal of this Agreement by October 1 of each year, the Agreement shall continue in force and effect as if it had been renewed.

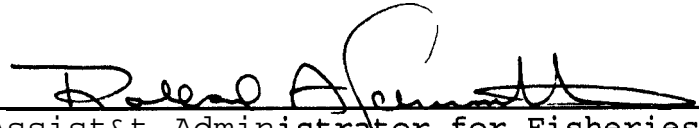
7. Amendments.

Any part of this Agreement or Appendices thereto may be amended at any time with the concurrence of the signatory parties or their authorized delegates.

a. Termination.


This Agreement may be terminated: (a) by mutual agreement;

(b) by MASS upon 60 days written notice to the Assistant Administrator for Fisheries; or (c) notwithstanding the renewal provision of subsection 6 (b) of this Agreement, by the Assistant Administrator for Fisheries, NOAA, or his or her authorized delegate upon 60 days written notice to MASS from NMFS stating reasons why MASS conservation programs are no longer in compliance with the criteria of Section (c) of the Act or that MASS has violated a provision of this Agreement. MASS may submit a written request for review to the Secretary of Commerce within 30 days of receipt of the termination notice. The Secretary shall consider all evidence submitted by MASS in its request for review and either reaffirm the conclusion of NMFS and terminate this Agreement at the end of the 60-day notification period, or reverse the conclusion of NMFS and revoke the notice of termination. Any provision in Appendix II may also be terminated in accordance with section 7 of this Agreement. Any Federal funds that have been obligated to, but not expended by, MASS as of the date of the termination notice pursuant to any of the above provisions, shall be retained by NMFS for reallocation pursuant to Section 6(d) of the Act, unless: (1) those funds are specifically approved for expenditure before the date of actual termination; (2) or the notice of termination is revoked by NMFS.


 Assistant Administrator for Fisheries,
 National Oceanic & Atmospheric Administration

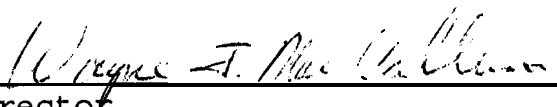
4/28/96

Date


 Commissioner,
 Massachusetts Department of Fisheries, Wildlife &
 Environmental Law Enforcement

7/8/96

Date


 Director
 Massachusetts Division of Fisheries
 and Wildlife

7/8/96

Date

APPENDIX I

Endangered Species

Shortnose sturgeon (*Acipenser brevirostrum*)
Humpback whale (*Megaptera novaeangliae*)
North Atlantic right whale (*Eubalaena glacialis*)
Fin whale (*Balaenoptera physalus*)
Sei whale (*Balaenoptera borealis*)
Kemp's ridley sea turtle (*Lepidochelys kemp*i)
Leatherback sea turtle (*Dermochelys coriacea*)
Green sea turtle(*Chelonia mydas*)

Threatened Species

Loggerhead sea turtle (*Caretta caretta*)

Designated Critical habitat

North Atlantic right whale

Appendix II

Attachment A

ENDANGERED SPECIES ACT SECTION 6 PROGRAM OR PROJECT AUTHORITY

Submitted by
Massachusetts Department of Fisheries,
Wildlife & Environmental Law Enforcement; and the
Massachusetts Division of Fisheries and Wildlife

- 1. Date:** March 14, 1996
- 2. Species:** Northern right whales (*Eubalaena glacialis*)
- 3. State:** Massachusetts
- 4. Project or program**
 - A. Project purpose:** Management Recommendations for Protection of Northern Right Whale Critical Habitat in Cape Cod Bay (CCB).
 - B. Description:** The study of CCB plankton systems and the relationship to northern right whale feeding dynamics is necessary to develop both state and federal management strategies to protect this critical habitat. In order to accomplish this goal, the Commonwealth will do an intensive study of the food resources, and factors which may impact these resources, for northern right whales in CCB. CCB is an important feeding and nursery area, most of which has been designated as critical habitat for the northern right whale. This study would investigate the factors that impact the health of zooplankton in CCB and to define strategies to protect, and if possible, manage this limited resource.

C. Location: Cape Cod Bay

D. Project Duration (past, present, planned segments) :

5. Project Number (if continuing **segment of existing** project):
none

6. Statue of Project Report Prepared for Previous Segment:
none

7. Project to be completed by a state agency or under a contract
to an outside entity:
none

8. Biological/Recovery Justification:

The North Atlantic right whale is the most endangered **large whale in the** world. Estimates indicate that only approximately 300 remain in the western North Atlantic.

Right whales have already received particular attention in Massachusetts waters because a large number of individuals from the population migrate annually through these waters. These whales are using CCB primarily as a foraging and nursery area each Spring. Photo identification of individual northern right whales has shown that about half the animals documented in the North Atlantic Right Whale Catalogue have been observed in Massachusetts waters.

Studies have begun to delineate the relationship between plankton and right whales feeding dynamics in the Great South Channel Critical Habitat. This relationship in CCB is not well documented or understood. Nevertheless, a recent NMFS Biological Opinion for a sea scallop aquaculture project, the first of its kind in CCB, recommends that the Army Corps of Engineers (COE) encourage investigations into whether this project is having any impacts on the plankton in the CCB. To do this effectively, a baseline of conditions

and an understanding of right whale use of CCB is necessary. Data specific to the facility to determine any impacts to habitat would also be collected. Preliminary work on right whale feeding in CCB was initiated by the Center for Coastal Studies, but further work is needed. The state would be instrumental in coordinating this effort.

9. Other pertinent information:

10. Limitations:

(those noted **NMFS/MASS** cooperative agreement, item **2(c)**).

Appendix II

Attachment B

ENDANGERED SPECIES ACT SECTION 6 PROGRAM OR PROJECT AUTHORITY

Submitted by
Massachusetts Department of Fisheries,
Wildlife & Environmental Law Enforcement; and the
Massachusetts Division of Fisheries and Wildlife

- 1. Date:** March 14, 1996
- 2. Species:** Kemp's Ripley sea turtle (*Lepidochelys kemp*), Loggerhead turtle (*Caretta caretta*), Leatherback turtle (*Dermochelys coriacea*)
- 3. State:** Massachusetts
- 4. Project or program**
 - A. Project purpose:** Study to Monitor Habitat Use by Marine Turtles in Cape Cod Bay (with particular emphasis on the Kemp's Ridley sea turtle.
 - B. Description:** Legal authority to allow marine turtle activities is currently limited to salvaging **stranded specimens** on the beach through a cooperative agreement with the FWS. Increasing numbers of stranded sea turtles in Cape Cod Bay (CCB) in recent years (over 100 in 1995) show that activities in New England waters may have a significant impact on sea turtles. There is a significant need for more information on sea turtle habitat, movements, and mortality factors in CCB waters. In part, this project would give authority to MASS to handle stranded sea turtles in its waters. The project would also initiate a study of the importance of CCB as habitat for sea turtles, especially Kemp's Ridley turtles, and monitor the fate of turtles that enter CCB. This

study is especially important in view of the relatively large number of Kemp's Ridley turtles that traditionally die each year in CCB as a result of cold stunning. Many aspects of this study would expand upon the study completed in 1993 in New York waters by Morreale and Standora. This new information would continue to build on the available data which will add another section to the puzzle of turtle habits in Northeastern U.S. waters.

C. Location: Cape Cod Bay

D. Project Duration (past, present, planned segments):

5. Project Number (if continuing segment of existing project):
none

6. Status of Project Report Prepared for Previous Segment:
none

7. Project to be completed by a state agency or under a contract to an outside entity:
none

8. Biological/Recovery Justification:
Identifying important marine habitat, determining juvenile/sub-adult near shore habitat use, and determining migration and foraging areas of adults are identified as Priority One tasks in the Kemp's Ridley Recovery Plan. These objectives are all applicable to Massachusetts's waters. The activities described above would help achieve some of the recovery objectives which NMFS has had to delay as it deals with other direct impediments to recovery such as the causes of direct mortality. This would be particularly valuable in the NMFS Northeast Region, where no sea turtle personnel are available for this type of directed research at the Northeast Center.

9. Other pertinent information:

10. Limitations:

(those noted NMFS/MASS cooperative agreement, item 2(c)).

Appendix III

**MEMORANDUM OF AGREEMENT
BETWEEN THE
DIVISION OF MARINE FISHERIES
AND THE
DIVISION OF FISHERIES AND WILDLIFE
WITHIN THE
MASSACHUSETTS DEPARTMENT OF FISHERIES, WILDLIFE AND
ENVIRONMENTAL LAW-ENFORCEMENT
REGARDING
JURISDICTIONAL RESPONSIBILITIES, LISTING PROCEDURES
AND DESIGNATION OF SIGNIFICANT HABITAT FOR
ENDANGERED, THREATENED AND SPECIAL CONCERN SPECIES**

I. PURPOSES

This Memorandum of Agreement (Agreement) is entered into by and between the Massachusetts Division of Marine Fisheries (**DMF**) and the Massachusetts Division of Fisheries and Wildlife (**DFW**) for the following purposes:

A To establish procedures for managing endangered, threatened or special concern species and their habitat to the extent such species and habitat are marine related;

To establish consistency and predictability in the management of marine resources pursuant to G. L. c. 131A, and management of marine resources pursuant to G. L. c. 130, §17;

C. To eliminate duplicative efforts by DMF and DFW as they relate to endangered, threatened and special concern marine species and their habitat;

D. To prevent disruption of state and federal fisheries management measures currently in place;

E. To prevent conflicts in agency special permitting processes;

F. To ensure that decisions are based upon the best scientific evidence available derived through investigation, consultation and cooperation; and

G. To combine in the regulatory process the marine expertise of DMF with the endangered species program of DFW in order to properly conserve and protect endangered, threatened and special concern marine resources.

II. AUTHORITIES

A. The DMF Director is authorized pursuant to G. L. c. 130, §17 to adopt, amend or repeal all rules and regulations, with approval of the Governor, necessary for the maintenance, preservation and protection of all marine fisheries resources between the mean high water mark and straight line extension of the lateral boundaries of the commonwealth drawn seaward to a distance of 200 miles or to a point where the water depth reaches 100 fathoms, whichever is greatest. In addition, the DMF Director is authorized, upon approval by the Marine Fisheries Commission and the Commissioner, to adopt, amend or repeal rules and regulations governing the manner of taking fish, legal size limits, seasons and hours for fishing quotas and the opening and closing of areas to fishing. Thus, the DMF Director has the authority to promulgate regulations designed to protect & endangered, threatened or special concern species and to designate marine areas within the boundaries specified above for the maintenance, preservation and protection of marine fishery resources. The Director has exercised this authority for the endangered Northern Right whale by promulgating regulations appearing at 321 CMR 12.00.

B. The DFW Director is authorized to promulgate regulations necessary to implement the provisions of G. L. c. 131A, the Massachusetts Endangered Species Act. This includes the authority to determine which plant and animal species shall be listed as endangered, threatened and special concern and the authority to designate significant habitats for endangered and threatened species populations. The DFW Director has promulgated regulations appearing at 321 CMR 10.00 which implement G. L. c. 131A. Thus, the DFW Director possesses and has exercised the authority to list, delist or change the status of any marine species or designate significant habitat for marine species.

C. G. L. c. 131A, §4 requires in part, that the DFW Director to conduct investigations in order to determine whether any species of plant or animal constitutes an endangered or threatened or special concern species. It also requires that the designation of significant habitat be based upon the "best scientific evidence available." Section 4 further requires that all agencies, departments, boards, commissions and authorities of the Commonwealth utilize their authorities in furtherance of the purposes of the Massachusetts Endangered Species Act.

D. Pursuant to these respective authorities, both DFW and DMF may promulgate certain rules and regulations, including the protection of habitat, relating to the protection of marine species which are endangered, threatened or of special concern.

III. DEFINITIONS

For the purposes of this Agreement, the following definitions shall apply:

A. DFW Director shall mean the Director of the Division of Fisheries and Wildlife within

the Department of Fisheries, Wildlife and Environmental Law Enforcement.

J. DMF Director shall mean the Director of the Division of Marine Fisheries within the Department of Fisheries, Wildlife and Environmental Law Enforcement.

C List shall mean the list established pursuant to G. L. c. 131A, §4 and currently codified as 321 CMR 10.60 which contains the names and status of plant and animal species listed as endangered, threatened or special concern species. When used as a verb, "list" or "listed" shall mean to place, or having placed a species on the official list established pursuant to G. L. c. 131A, §4.

D. Marine species shall mean any animal life inhabiting the ocean or its connecting waters including any mammal, reptile, crustacean or marine fish, whether free swimming or free moving, and any shellfish or sea worms, whether or not imbedded in the soil.

E. Marine environment shall mean all waters within the rise and fall of the tide and the marine limits of the jurisdiction of the Commonwealth.

IV. AGREEMENT

In recognition of the above considerations, and unless otherwise specified by statute, the DFW and DMF Directors agree to the following:

A. Listing of Species

1. Agency Listing

Should proposed state action pursuant to G. L. c. 131A, or proposed federal action pursuant to the federal Endangered Species Act, 16 U.S.C. §§ 1531-1544, as amended, or any petition by an interested party, involve the listing, delisting or change in status of a marine species, the DFW Director shall submit such proposal to the DMF Director for his review and comment within a 21 day period. Within 21 days of the receipt of such a proposal, the DFW Director, shall further, after consultation with the Natural Heritage and Endangered Species Program, make a determination as to whether sufficient evidence has been submitted to warrant a review of the species status. If a determination has been made that sufficient information has been submitted, the DFW Director shall refer the proposal to the Nongame Advisory Committee for its review, provided that if the DMF Director requires additional time for his review and comment, such referral shall be made with the stipulation that the Nongame Advisory Committee seek his advice and comment. The DMF Director shall, in a timely manner, but in any case not more than 60 days after his initial receipt of the proposal from the DFW Director, submit a recommendation to the DFW Director to list, delist, or change the status of such marine species, together

with a record, if any, consisting of the petition, any public hearing and agency response previously held concerning the species in question, staff review and comment, and any management measures or regulations previously adopted concerning such species, The DFW Director shall not hold a public hearing on the proposal until the DMF Director has submitted his recommendation, or until the expiration of 60 days from receipt of the proposal by the DMF Director, whichever comes first.

2. List Review

The DFW and DMF Directors shall review the list of endangered, threatened and special concern species, at least once every five years for the purpose of listing, delisting or changing the status of a marine species. At any time, the DMF Director may request the DFW Director to list, delist, or amend the status of any species in accordance with G. L. c. 131A, 321 CMR 10.03 and this Agreement,

B. Agency Actions

1. Scientific and Educational Use Permits

After receiving an application for a scientific or educational use permit for the taking of any state listed marine species or before issuing any such permit under 321 CMR 10.04 or 322 CMR 7.01(4)(e), the Director to whom the application was made shall consult with the other Director to determine whether such permit should be granted and under what conditions. This consultation shall include, but not be limited to, the review of artificial propagation programs, and programs for transplant or translocation.

2. aeration Permits

After receiving a request for an Alteration Permit in the marine environment under 321 CMR 10.31, the DFW Director shall consult the DMF Director to determine whether such permit should be granted and under what conditions. This consultation shall include, but not be limited to, a review of activities which do not require an Alteration Permit.

3. Responsibilities of State Agencies

Prior to the dissemination outside of DMF or DFW of any information requested or distributed pursuant to 321 CMR 10.05 regarding: (1) location, biology or habitat requirements of state listed marine species; (2) draft management plans for state-owned lands on which state-listed species occur; (3) recommendations regarding protection, conservation and restoration of the listed species on the land; and (4) recommendations regarding the use of all practicable means and measures to avoid

or minimize damage to state listed marine species and their habitat, the DFW Director shall consult the DMF Director for his review and comment.

C. Significant Habitat

1. Agency Designation

In addition to the requirements of subpart 2(a) and (b) of part D of this Agreement, the designation of a protected or significant habitat in the marine environment made on the initiative of either the DMF or DFW Director shall not occur until such time as each Director has had an opportunity to review and comment on a proposal for such designation consistent with any statutory time limits for such designation.

2. Petition Process

(a) Petition Arising Under G. L. c. 131A

Should any petition arising under G. L. c. 131A involve the designation or revision of significant habitat for a population of a state listed marine species or involve a significant habitat in the marine environment, the DFW Director shall submit the petition to the DMF Director and notify the Natural Heritage and Endangered Species Program of said petition. The DMF Director shall either:

(i) initiate the implementation of a protected habitat in a timely manner, in which case a record consisting of the petition, public hearing response, staff review, comment, management measures, any regulations adopted regarding such habitat and a recommendation to designate or to eliminate designation status of said marine area shall be submitted to the DFW Director who may, based upon that record, take any action regarding the designation status of significant habitat for the area named in said petition, if necessary or appropriate pursuant to G. L. 131A and this Agreement; or

(ii) resubmit the petition with a recommendation regarding the designation status of the area named by said petition, along with any supporting documentation to the DFW Director for his review and action pursuant to G. L. c. 131A and this Agreement.

(b) Petition Arising Under G. L. c. 130 417

Should any petition, arising under G. L. c. 130, §17, involve the designation or revision of a protected habitat for a population of a state listed marine species or involve a protected habitat for such species in the marine

environment the DMF Director may:

(i) initiate implementation of a protected habitat in a timely manner, in which case a record consisting of the petition, public hearing response, staff review, **comment**, management measures, any regulations adopted regarding such habitat and a recommendation to designate or to eliminate the designation status of said marine area shall be submitted to the DFW Director who may, based upon that record, take any action regarding the **designation status of significant habitat for the area named in said petition, if necessary and appropriate pursuant to G. L. 131A and this Agreement; or**

(ii) submit the petition with a recommendation regarding the designation status of the area named in said petition, along with any supporting documentation to the DFW Director for his review and action pursuant to G. L. c. 131A and this Agreement.

(c) Annual Review

In addition to the petition process, on an annual basis, the DMF and DFW Directors shall review areas in the marine environment and determine which, if any, should be designated as protected or significant habitat. The DMF and DFW Directors may, from time to time, revise such designations by modifying those areas designated as protected or significant habitat or by removing designation status from areas that no longer warrant designation after consultation with each other and in accordance with G. L. c. 130, 131, 131A and this Agreement. Such revisions shall be treated in accordance with the procedures set forth in section IV C of this Agreement.

D. Notice

1. Each Director shall notify the other of the date, time and location of any public hearing held in furtherance of this Agreement.
2. Prior to promulgating any regulations or management measures pertaining to state listed marine species and/or their habitats, each Director shall notify and request review and comment by the other of a draft of such regulations or management measures.
3. Should the proposed listing, delisting or change in status of a state listed marine species or the designation or revision of protected or significant habitat be placed on the agenda of a meeting of either the Fisheries and Wildlife Board or the Marine Fisheries Commission, whether or not as the result of a specific petition, the appropriate Director shall notify the other in writing at least 7 days prior to the

**MEMORANDUM OF AGREEMENT
BETWEEN THE
DIVISION OF MARINE FISHERIES
AND THE
DIVISION OF FISHERIES AND WILDLIFE
WITHIN THE
MASSACHUSETTS DEPARTMENT OF FISHERIES, WILDLIFE AND
ENVIRONMENTAL LAW ENFORCEMENT
REGARDING
JURISDICTIONAL RESPONSIBILITIES, LISTING PROCEDURES
AND DESIGNATION OF SIGNIFICANT HABITAT FOR
ENDANGERED, THREATENED AND SPECIAL CONCERN SPECIES**

I. PURPOSES

This Memorandum of Agreement (Agreement) is entered into by and between the Massachusetts Division of Marine Fisheries (**DMF**) and the Massachusetts Division of Fisheries and Wildlife (**DFW**) for the following purposes:

- A.** To establish procedures for managing endangered, threatened or special concern species and their habitat to the extent such species and habitat are marine related;
- B.** To establish consistency and predictability in the management of marine resources pursuant to G. L. c. 131A, and management of marine resources pursuant to G. L. c. 130, §17;
- C.** To eliminate duplicative efforts by DMF and DFW as they relate to endangered, threatened and special concern marine species and their habitat;
- D.** To prevent disruption of state and federal fisheries management measures currently in place;
- E.** To prevent conflicts in agency special permitting processes;
- F.** To ensure that decisions are based upon the best scientific evidence available derived through investigation, consultation and cooperation; and
- G.** To combine in the regulatory process the marine expertise of DMF with the endangered species program of DFW in order to properly conserve and protect endangered, threatened and special concern marine resources.

II. AUTHORITIES

A The DMF Director is authorized pursuant to G. L. c. 130, §17 to adopt, amend or repeal all rules and regulations, with approval of the Governor, necessary for the maintenance, preservation and protection of all marine fisheries resources between the mean high water mark and straight line extension of the lateral boundaries of the commonwealth drawn seaward to a distance of 200 miles or to a point where the water depth reaches 100 fathoms, whichever is greatest. In addition, the DMF Director is authorized, upon approval by the Marine Fisheries Commission and the Commissioner, to adopt, amend or repeal rules and regulations governing the manner of taking fish, legal size limits, seasons and hours for fishing quotas and the opening and closing of areas to fishing. Thus, the DMF Director has the authority to promulgate regulations designed to protect endangered, threatened or special concern species and to designate marine areas within the boundaries specified above for the maintenance, preservation and protection of marine fishery resources. The Director has exercised this authority for the endangered Northern Right whale by promulgating regulations appearing at 321 CMR 12.00.

B. The DFW Director is authorized to promulgate regulations necessary to implement the provisions of G. L. c. 131A, the Massachusetts Endangered Species Act. This includes the authority to determine which plant and animal species shall be listed as endangered, threatened and special concern and the authority to designate significant habitats for endangered and threatened species populations. The DFW Director has promulgated regulations appearing at 321 CMR 10.00 which implement G. L. c. 131A. Thus, the DFW Director possesses and has exercised the authority to list, delist or change the status of any marine species or designate significant habitat for marine species.

C. G. L. c. 131A, §4 requires in part, that the DFW Director to conduct investigations in order to determine whether any species of plant or animal constitutes an endangered or threatened or special concern species. It also requires that the designation of significant habitat be based upon the "best scientific evidence available." Section 4 further requires that all agencies, departments, boards, commissions and authorities of the Commonwealth utilize their authorities in furtherance of the purposes of the Massachusetts Endangered Species Act.

D. Pursuant to these respective authorities, both DFW and DMF may promulgate certain rules and regulations, including the protection of habitat, relating to the protection of marine species which are endangered, threatened or of special concern.

III. DEFINITIONS

For the purposes of this Agreement, the following definitions shall apply:

A. DFW Director shall mean the Director of the Division of Fisheries and Wildlife within

the Department of Fisheries, Wildlife and Environmental Law Enforcement.

B. DMF Director shall mean the Director of the Division of Marine Fisheries within the Department of Fisheries, Wildlife and Environmental Law Enforcement.

C. List shall mean the list established pursuant to G.L. c. 131A, §4 and currently codified as 321 CMR 10.60 which contains the names and status of plant and animal species listed as endangered, threatened or **special concern** species. When used as a verb, "list" or "listed" shall mean to place or having placed a species on the official list established pursuant to G.L. c. 131A, §4.

D. Marine species shall mean any animal life inhabiting the ocean or its connecting waters including any mammal, reptile, crustacean or marine fish; whether free swimming or free moving, and any shellfish or sea worms, whether or not imbedded in the soil.

E. Marine environment shall mean all waters within the rise and fall of the tide and the marine limits of the jurisdiction of the Commonwealth.

IV. AGREEMENT

In recognition of the above considerations, and unless otherwise specified by statute, the DFW and DMF Directors agree to the following:

A. Listing of Species

1. Agency Listing

Should proposed state action pursuant to G. L. c. 131A, or proposed federal action pursuant to the federal Endangered Species Act, 16 U.S.C. §§1531-1544, as amended, or any petition by an interested party, involve the listing, delisting or change in status of a marine species, the DFW Director shall submit such proposal to the DMF Director for his review and comment within a 21 day period. Within 21 days of the receipt of such a proposal, the DFW Director, shall further, after consultation with the Natural Heritage and Endangered Species Program, make a determination as to whether sufficient evidence has been submitted to warrant a review of the species status. If a determination has been made that sufficient information has been submitted, the DFW Director shall refer the proposal to the Nongame Advisory Committee for its review, provided that if the DMF Director requires additional time for his review and comment, such referral shall be made with the stipulation that the Nongame Advisory Committee seek his advice and comment. The DMF Director shall, in a timely manner, but in any case not more than 60 days after his initial receipt of the proposal from the DFW Director, submit a recommendation to the DFW Director to list, delist, or change the status of such marine species, together

with a record, if any, consisting of the petition, any public hearing and agency response **previously** held concerning the species in question, staff review and **comment**, and any management measures or regulations previously adopted concerning such species. The DFW Director shall not hold a public hearing on the proposal until the DMF Director has submitted his recommendation, or until the expiration of 60 days from receipt of the proposal by the DMF Director, whichever comes first.

2. List Review

The DFW and DMF Directors shall review the list of endangered, threatened and special concern species, **at least** once **every five years** for the purpose of listing, delisting or changing the status of a marine species. At any time, the DMF Director may request the DFW Director to **list, delist**, or amend the status of any species in accordance with G. L. c. 131A, 321 CMR 10.03 and this Agreement,

B. Agency Actions

1. Scientific and Educational Use Permits

After receiving an **application** for a scientific or **educational use permit** for the taking of any state listed marine species or before issuing any such permit under 321 CMR 10.04 or 322 CMR 7.01(4)(e), the Director to whom the application was made shall consult with the other Director to determine whether such permit should be granted and under what conditions. This consultation shall include, but not be limited to, the review of artificial propagation programs, and programs for transplant or translocation.

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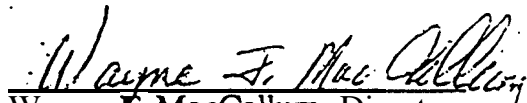
meeting and provide an opportunity for said Director or his designee to attend the meeting and to be placed on the agenda

E. External Cooperative Agreements

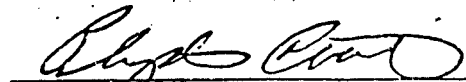
This Agreement shall be read in conjunction with all applicable law. Any other cooperative agreement entered into with federal, state or foreign agencies or any organization shall be consistent with the terms of this Agreement.


V. EFFECTIVE DATE

This Agreement shall become effective when signed by the DFW Director, the DMF Director and the Commissioner of the Department of Fisheries, Wildlife and Environmental Law Enforcement. Either of the aforementioned Directors may rescind this Agreement upon thirty days written notice to the other Director.


Wayne F. MacCallum, Director
Division of Fisheries and Wildlife

Dated Jan 12, 1994


Philip G. Coates, Director
Division of Marine Fisheries


John C. Phillips, Commissioner
Department of Fisheries, Wildlife
& Environmental Law Enforcement